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IN THE

Supreme Court of the United States

October Term, 1962

No. 1015

SINCLAIR REFINING COMPANY,

Petitioner,

v.

VILLAIN & FASSIO E COMPAGNIA, INTERNATIONALE DI GENOVA SOCIETA, RIUNITE DI NAVIGAZIONE, S.p.A.,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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INDEX

	PAGE
Opinions Below	1
Jurisdiction	1
Question Presented	2
Statutes Involved	2
Statement	2
Reasons for Granting the Writ	3
Conclusion	11
Appedix A—Inland Rules	12
International Rules	13–14
B—Opinions Below	15–19

Citations

Cases:

Belden v. Chase, 150 U. S. 674, 698-699	5, 10
Oaksmith v. Garner (9 Cir. 1953), 205 F. 2d 262, 266	4
Oregon, The, 158 U. S. 186, 202, 203 (1894)	8–9
Union Shipping & Trading Co. v. United States, 127 F. 2d 771, 773 (2 Cir. 1942)	7, 9
United States v. Woodbury (1 Cir. 1949), 175 F. 2d 854, 861	4

Text Books:

Farwell The Rules of the Nautical Road, 3rd Ed.	3, 4, 7, 9, 10
Knight's Modern Seamanship, 13th Ed., 1960	4
LaBoyteaux The Rules of the Road at Sea	9
Marsden Collisions at Sea, 1961 Ed.	7
Watch Officer's Guide, 9th Ed. 1961	4

PAGE

STATUTES:

Inland Rules, 30 Stat. 96—preamble 3

Article 27 (33 U. S. C. 212) 5

Article 29 (33 U. S. C. 221) 5, 10

International Rules, 26 Stat. 322 as amended 65 Stat. 406—applicability clause 33 U. S. C. 143 .. 3, 8

House Report 807, 82nd Congress, First Session, 1951 U. S. Code Congressional and Administrative Service, pp. 2331-3 8

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VILLAIN & FASSIO E COMPAGNIA, INTERNATIONALE DI GENOVA SOCIETA, RIUNITE DI NAVIGAZIONE, S.p.A.,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Petitioner Sinclair Refining Company prays that a writ of certiorari issue to review the amended judgment of the United States Court of Appeals for the Second Circuit entered herein on March 18, 1963.

Citations to Opinions Below

The opinion of the District Court, printed in Appellant's Appendix below R. 153a-181a, is reported in 207 F. Supp. 700. The opinion of the Court of Appeals, printed in Appendix B, *infra* pages 16-19, is not yet reported.

Jurisdiction

The judgment of the Court of Appeals was entered on February 20, 1963 (App. B, p. 15). Rehearing was denied

but the judgment amended on March 18, 1963 (App. B, p. 19). Jurisdiction of this Court is invoked under 28 U. S. C. § 1254(1). The Admiralty jurisdiction of the District Court was invoked under 28 U. S. C. 1333(1).

Question Presented

Whether the "R" signal provided for in the International Rules may be used by a vessel at anchor in fog in Inland Waters notwithstanding there is no provision for such a signal in the Inland Rules and notwithstanding the specific provision of the International Rules that they "shall not apply to the harbors, rivers and inland waters of the United States" (33 U. S. C. 143; App. A, p. 13).

Statutes Involved

The statutory provisions involved are the Navigation Rules: Articles 15, 18, 27, and 29 of the Inland Rules (30 Stat. 96, 33 U. S. C. 191, 203, 212, 221); Rule 15 and the applicability paragraph of the International Rules (65 Stat. 407, 33 U. S. C. 143, 145 [c][iv]). They are printed in Appendix A, *infra*, pages 12-14.

Statement

In this Delaware River collision case, the inbound loaded tanker E. W. SINCLAIR, upon hearing, from a vessel somewhere ahead but not in sight, a three-whistle signal, "made a 20° right turn out of the channel" to avoid risk of collision. The signalling vessel proved to be the FASSIO, which lay at anchor in thick fog about 250 meters east of the channel and the SINCLAIR hit her (*per curiam* opinion, App. B, pp. 16-17). The District Judge found (1) that the FASSIO actually sounded the International "R" signal (short-long-short; R. 169a) and (2) that the SINCLAIR's master and pilot mistook it for a backing signal of three short blasts

(R. 160a). As to the question presented by this petition —whether the International "R" signal may be used by a vessel at anchor in fog in inland waters notwithstanding there is no provision for such a signal in the Inland Rules—the District Judge held in the affirmative, setting forth his reasons in detail and noting that it was a case of first impression, there being no prior decision on the point (R. 171a).

The Court below affirmed, holding that the International "R" signal "although not called for in the Inland Rules, had an appropriate meaning" and that "its omission from the Inland Rules does not prohibit its use to supplement the fog bell" (*per curiam* opinion, App. B, p. 19).

Reasons for Granting the Writ

1. Congress has forbidden the co-mingling of the International Rules with the Inland Rules. The enacting clause of the International Rules, as revised by the Act of October 11, 1951, c. 495, Section 1, 65 Stat. 406, 33 U. S. C. 143; Appendix A, p. 13, expressly provides that they

> "shall not apply to the harbors, rivers and inland waters of the United States."

Co-mingling of the two separate sets of Rules never was permitted. The preamble to the Inland Rules, as first enacted in 1897, read in part:

> "Whereas, It is desirable that the regulations relating to the navigation of all harbors, rivers, and inland waters of the United States, except the Great Lakes and their connecting and tributary waters as far east as Montreal and the Red River of the North and rivers emptying into the Gulf of Mexico and their tributaries, shall be stated in one act: Therefore, * * *."
>
> (Act of June 7, 1897, 30 Stat. 96; Farwell THE RULES OF THE NAUTICAL ROAD, 3rd Ed., p. 17).

The separation of Inland from International Rules is noted on U. S. Coast & Geodetic Survey charts (R. 42a) and correctly dealt with in *United States* v. *Woodbury* (1 Cir. 1949), 175 F. 2d 854, involving a visual signal not provided for in the Inland Rules:

> "* * * Congress in enacting the Inland Rules must have intended to establish a full and complete set of rules for inland waters, and hence we conclude that when Congress omitted to provide any signal for a given situation occurring in inland waters it meant to require no signal for that situation in those waters even though a signal was required therefor in international waters" (p. 861).

Oaksmith v. *Garner* (9 Cir. 1953), 205 F. 2d 262, 266, is to like effect.

America's foremost authority * on Rules of the Nautical Road says of the International "R" signal here involved:

> "Neither the gong signal for vessels over 350 feet in length nor the three blast warning signal (R) authorized for all vessels anchored in fog at sea can be used in the inland waters of the United States." (Farwell THE RULES OF THE NAUTICAL ROAD, 3rd Ed., p. 173).

2. The District Court recognized that the sounding of the FASSIO's International "R" signal was a departure from the Inland Rules not previously passed upon by any court (R. 171-3a). The signal was held to be justified under the Special Circumstance rule permitting

* Farwell's THE RULES OF THE NAUTICAL ROAD, published by the United States Naval Institute, has been kept current since 1954 by Commander Alfred Prunski, U. S. Coast Guard, of whom the preface to Knight's MODERN SEAMANSHIP, 13th Ed. 1960, says: "Lt. Commander Alfred Prunski, U. S. Coast Guard, revised Part III, Rules of the Road. He has succeeded the late Captain Farwell as the country's leading authority on this modern aspect of seafaring." Prunski receives similar credit in the preface to "Watch Officer's Guide," 9th Ed., 1961.

a departure from the Rules when "necessary to avoid immediate danger," the Court saying "Article 27 of the Inland Rules specifically recognizes departures for special circumstances" (R. 173a). However, the District Court also recognized that the Inland danger signal would have served the same purpose, from which it follows that no departure from the Rules was "necessary" (R. 172a). Accordingly, Article 27 provides no justification for the FASSIO's use of the "R"' signal.

Article 27 is not cited in the Court of Appeals' opinion, which relies instead upon Article 29, saying:

> "Article 29 of the Inland Rules, 33 U. S. C. Section 221 provides in part 'Nothing in these rules shall exonerate any vessel * * * from the consequences of * * * the neglect of any precaution which may be required by the ordinary practice of seamen, or by the special circumstances of the case'" (Opinion, App. B, p. 19).

The "special circumstances" there referred to are the same as those referred to by the District Court, namely, "any special circumstances which may render a departure from the above rules necessary in order to avoid immediate danger" (33 U. S. C. 212). As noted above, the International "R" signal was *not* "necessary" because the Inland danger signal would have served the same purpose.

Nor was the FASSIO in any "immediate danger" since the vessels still were half a mile apart when the FASSIO's second "R" was sounded and she was at anchor 250 meters outside of the dredged channel in which the SINCLAIR was proceeding. Immediate danger did not arise until after the SINCLAIR made her "20 right turn out of the channel" upon "hearing the three whistle signal." (Court of Appeals opinion, App. B, p. 17).

"Special circumstances" is a phrase of art, defined in *Belden* v. *Chase*, 150 U. S. 674:

> "* * * Obviously they [the rules] must be rigorously enforced in order to attain the object for which

they were framed, which could not be secured if the masters of vessels were permitted to indulge their discretion in respect of obeying or departing from them. Nevertheless it is true that there may be extreme cases where departure from their requirements is rendered necessary to avoid impending peril, but only to the extent that such danger demands. *The John L. Hasbrouck*, 93 U. S. 405; *The Sunnyside*, 91 U. S. 208; *The Johnson*, 9 Wall. 146; The City of Washington, 92 U. S. 31; *The Voorwarts & Khedive*, 5 App. Cas. 876; *The Byfoged Christensen*, 4 App. Cas. 669.

And while under Rule twenty-four [now 27] in construing and obeying the rules, due regard must be had to all dangers of navigation and to any special circumstances which may exist in any particular case, rendering a departure from them necessary in order to avoid immediate danger, the burden of proof lies on the party alleging that he was justified in such departure. *The Agra*, L. R. 1 P. C. 501; *The General Lee*, Irish L. R. 3 Eq. 155. Indeed, in *The Agra*, it was ruled that not only must it be shown that the departure at the time it took place was necessary in order to avoid immediate danger, but also that the course adopted was reasonably calculated to avoid that danger. And it is the settled rule in this court that when a vessel has committed a positive breach of statute, she must show not only that probably her fault did not contribute to the disaster, but that it could not have done so. *The Pennsylvania*, 19 Wall. 125, 136; *Richelieu Navigation Co.* v. *Boston Ins. Co.*, 136 U. S. 408, 422.

Obedience to the rules is not a fault even if a different course would have prevented the collision, and the necessity must be clear and the emergency sudden and alarming before the act of disobedience can be excused. Masters are bound to obey the rules and entitled to rely on the assumption that they will be obeyed, and should not be encouraged to treat the exceptions as subjects of solicitude rather than the rules. The Oregon, 18 How. 570" (pp. 698-699).

That decision has lost none of its authority through the years. Farwell THE RULES OF THE NAUTICAL ROAD, 3rd Ed. pp. 325-326; Marsden COLLISIONS AT SEA, 1961 Ed. p. 586.

So far as the record discloses, the FASSIO's sounding of the International "R" signal was only the second time it had ever been sounded in Inland Waters (R. 291a). Her own Delaware River pilot did not recognize it, and heard the series of blasts as "something unfamiliar" that had "no meaning" to him (R. 83-4a). Doubtless it also is unfamiliar to the many mariners who never go deep sea. Thus the International "R" signal clearly is *not* "ordinary practice" in Inland Waters. Nor was it a "precaution" for the FASSIO. Had she simply continued ringing her fog bell, the SINCLAIR would have missed her by 250 meters (R. 34a). Instead, "Believing that the signal they heard was a backing signal, they assumed that a southbound vessel was in the channel with her engines going astern." (District Court opinion, R. 160a); "the SINCLAIR's captain and pilot assumed that the safest maneuver was to get out of the channel. They preferred to risk a grounding rather than a collision" (164a); "she was faced with a dilemma; to reverse engines and stay in the channel while trying to stop, or to take her chances to the right of the channel" (166-7a). The backing signal is three short blasts and the International "R" is short-long-short. The vagaries of fog compound the confusion that is the natural result of any unauthorized signal. As said by Judge Learned Hand in *Union Shipping & Trading Co.* v. *United States*, 127 F. 2d 771 (C. C. A. 2 1942):

> "* * * We need not say that there can never be circumstances which may make it imperative for a ship to supplement the statutory signals; but ordinarily she need not, and ought not, for she will tend rather to prevent than to promote mutual understanding" (p. 773).

3. The International "R" signal was introduced by the 1948 Convention on Safety of Life at Sea, adopted by the Act of October 11, 1951, c. 495, Section 6, and made effective 2½ years later, on January 1, 1954 (Historical note, including Presidential Proclamation, 33 U. S. C. 143). This gave deep sea sailors an opportunity to learn the use of the new signal. No such advance notice is afforded by the decision below. Nor did the Judges have the benefit of hearings to determine whether the new International "R" signal is appropriate for Inland Waters; and if so, whether it should be available to vessels aground or moored as well as vessels at anchor. Legislative hearings had enabled Congress to determine (1) that the amendments to the International Rules promulgated by the 1948 Convention should be incorporated into the International Rules; and (2) that they should *not* be made applicable in Inland Waters (33 U. S. C. 143). House Report No. 807, 82nd Congress, 1st Session, 1951, U. S. Code Congressional and Administrative Service, pp. 2331-2333 notes the need for International uniformity on the high seas and the fact that in "* * * inland water areas * * * other appropriate and adequate sets of rules, regulations, and laws are now in effect" (p. 2331). The decision below ignores that separation and constitutes just such judicial tinkering with the Rules as is cautioned against in *The Oregon*, 158 U. S. 186 (1894), where the vessel sounding the statutory signal was claimed to have been at fault for failing to supplement the signal as a "precaution which may be required by the ordinary practices of seamen" (p. 203), this Court saying:

> "* * * It follows that, under all ordinary circumstances, a vessel discharges her full duty and obligation to another by a faithful and literal observance of these rules. The power to superadd to them other requirements involves the power to determine what shall be superadded, and in this particular there is room for a great and embarrassing diversity of opinion. Thus, one court might hold that, in addition to displaying the regulation light, a vessel at

anchor should swing a torch; another, that she should ring a bell; another, that she should blow a horn, beat a drum, or fire a cannon, and the result would be that a lookout would never know when he had performed his full duty to an approaching vessel" (p. 202).

* * *

"If courts were at liberty to add to the requirements of the statute, it would always be claimed that the signal added was not the proper signal that should have been used" (p. 203).

Unless and until Congress sees fit to amend the Inland Rules so as to include the "R" signal, its use is bound to lead to just such misunderstandings as occurred in the instant case. *Union Shipping & Trading Co.* v. *United States*, 127 F. 2d 771, 773 (C. C. A. 2 1942).

4. The Court of Appeals' decision originally outlawed the commonly used danger signal as misleading if sounded by a vessel under way (Appendix B, p. 18). This was amended after petition for rehearing, changing the sentence "The danger signal would have indicated that he was himself under way" by substituting "might" for "would" and adding the words "although its use in such circumstances could be sustained" (Appendix B, p. 19). This is in line with the District Judge's view that a mariner has a "choice" as to whether to use the International "R" or the Inland danger signal, notwithstanding 33 U. S. C. 143 to the contrary (R. 169a). Giving a mariner a "choice" would defeat the essential uniformity of the Navigation Rules. Laboyteaux THE RULES OF THE ROAD AT SEA, p. 3; Farwell THE RULES OF THE NAUTICAL ROAD, 3rd Ed,. p. 197. It would substitute for the immediate sounding of the familiar danger signal, the agony of indecision between two alternatives. Lives and property thus would be placed in needless jeopardy.

Decisions as to what action to take to avoid risk of collision must be made without hesitation. To achieve

that certainty, the Navigation Rules must be fixed, without offering alternatives or encouraging exceptions. *Belden* v. *Chase*, 150 U S. 674, 699. Heretofore an anchored vessel sounding the danger signal when threatened by maneuvers of something beyond the range of her fog bell has not been called upon to justify her signal; it was mandatory under Article 29 as "required by the ordinary practice of seamen." (33 U. S. C. 221; Appendix B, p. 19; Farwell THE RULES OF THE NAUTICAL ROAD, 3rd Ed., pp. 173, 199, 307. If it were true that "The danger signal might have indicated that he was himself under way", how could it be said that "its use in such circumstances could be sustained"? (Amended Opinion, Appendix B, p. 19).

Deck officers must know the Navigation Rules to qualify for a license, which may be suspended or revoked by the Coast Guard for infractions or failure to keep abreast of changes in the Rules. How are they to learn of a change that is not in the rules? Worse still, a mariner who does not know the applicable Rules is incompetent and a vessel under the command of an incompetent master is unseaworthy. The Coast Guard investigation in this case was closed without the SINCLAIR's pilot even being called as a witness after the FASSIO's master had testified that he sounded the International "R" signal (R. 83a). Had that been an appropriate signal, its misinterpretation would not have been condoned.

Shipowners must notify their masters of any change in the Navigation Rules or regulations, under penalty of being held at fault for conforming to an outmoded practice as well as being denied the right to limit liability for failure to notify the master of the new ruling. Circularization of the Sinclair fleet and all others must be deferred until the notices can be made meaningful by saying (1) whether the ruling below represents the law today; and if so, (2) whether the new signal is permissive or mandatory and

(3) whether the Inland danger signal may or may not be used as an alternative. Those questions are as yet unanswered and only this Court can resolve them.

Meanwhile, the lives of vessel personnel and passengers are jeopardized daily by the decision below, which disrupts the essential uniformity of the Inland Rules of Navigation.

CONCLUSION

For the foregoing reasons, this petition for a writ of certiorari should be granted.

EUGENE UNDERWOOD,
Counsel for Petitioner.

April 9, 1963

APPENDIX A

The pertinent provisions of the Navigation Rules for harbors, rivers and inland waters (33 U. S. C. 151-232) are:

"§ 191. *Sound signals for fog, etc., generally* (Art. 15)

• • •

In fog, mist, falling snow, or heavy rainstorms, whether by day or night, the signals described in this section shall be used as follows, namely:

• • •

(d) A vessel when at anchor shall, at intervals, of not more than one minute, ring the bell rapidly for about five seconds" (33 U. S. C. 191).

Article 18, Rule III:

"If when steam vessels are approaching each other, either vessel fails to understand the course or intention of the other, from any cause, the vessel so in doubt shall immediately signify the same by giving several short and rapid blasts, not less than four, of the steam whistle" (33 U. S. C. 203, Rule III).

"§ 212. *Special circumstances requiring departure from rules* (Art. 27).

In obeying and construing these rules due regard shall be had to all dangers of navigation and collision, and to any special circumstances which may render a departure from the above rules necessary in order to avoid immediate danger" (33 U. S. C. 212).

• • •

"§ 221. *Usual additional precautions required generally* (Art. 29)

Nothing in these rules shall exonerate any vessel, or the owner or master or crew thereof, from the consequences of any neglect to carry lights or signals, or of any neglect to keep a proper lookout, or of the neglect of any precaution which may be required by the ordinary practice of seamen, or by the special circumstances of the case" (33 U. S. C. 221).

Entirely separate from the above Inland Rules are the International Rules (26 Stat. 322 as amended, 65 Stat. 406; 33 U. S. C. 143-147d) the pertinent provisions of which are:

"§ 143. *Regulations for preventing collisions at sea; proclamation by President; applicability*

The President is authorized to proclaim the regulations set forth in sections 144-147d of this title for preventing collisions involving water-borne craft upon the high seas, and in all waters connected therewith. Such proclamation, together with the regulations, shall be published in the Federal Register, and after the effective date specified in such proclamation, such regulations shall have effect as if enacted by statute and shall be followed by all public and private vessels of the United States, and by all aircraft of United States registry to the extent therein made applicable. Sections 144-147d of this title shall not apply to the harbors, rivers, and inland waters of the United States; to the Great Lakes of North America and their connecting and tributary waters as far east as the lower exit of the Lachine Canal in Montreal in the Province of Quebec, Canada; to the Red River of the North and the rivers emptying into the Gulf of Mexico and their tributaries; nor, with respect to aircraft, to any territorial waters of the United States. Oct. 11, 1951, c. 495, § 1, 65 Stat. 406" (33 U. S. C. 143).

• • •

"§ 145m. *Sound signals (Rule 15)—Power-driven, and sailing vessels*

• • • •

(c) In fog, mist, falling snow, heavy rainstorms, or any other conditions similarly restricting visibility, whether by day or night, the signals prescribed in this section shall be used as follows:

• • •

(iv) A vessel when at anchor shall at intervals of not more 1 minute ring the bell rapidly for about 5 seconds. In vessels of more than 350 feet in length the bell shall be sounded in the forepart

of the vessel, and in addition there shall be sounded in the after part of the vessel, at intervals of not more than 1 minute for about 5 seconds, a gong or other instrument, the tone and sounding of which cannot be confused with that of the bell. Every vessel at anchor may in addition, in accordance with section 145j of this title, sound three blasts in succession, namely, one short, one prolonged, and one short blast, to give warning of her position and of the possibility of collision to an approaching vessel" (65 Stat. 415; 33 U. S. C. 145m).

APPENDIX B

(Opinion of United States Court of Appeals for the Second Circuit)

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 218—October Term, 1962

(Argued January 22, 1963 Decided February 20, 1963)

Docket No. 27850

VILLAIN & FASSIO E COMPAGNIA, INTERNATIONALE DI GENOVA SOCIETÀ, RIUNITE DI NAVIGAZIONE, S.p.A., as owner of the Motor Vessel ANGELA FASSIO,

Libellant-Appellee,

v.

Tank Steamer E. W. SINCLAIR,
SINCLAIR REFINING COMPANY,

Claimant-Respondent-Appellant.

Before:

FRIENDLY, SMITH and MARSHALL, *Circuit Judges.*

Appeal from decree of the United States District Court for the Southern District of New York, Edelstein, J., holding the Tank Steamer E. W. Sinclair solely at fault in a collision with the Motor Vessel Angela Fassio.

Affirmed.

ALBERT D. JORDAN, New York, N. Y. (Ehrich, Stock, Valicenti, Leighton & Holland, Haight, Gardner, Poor & Havens, and Robert J. Nicol, on the brief) *for appellee.*

STANLEY R. WRIGHT, New York, N. Y. (E. Lisk Wyckoff, and Burlingham Underwood Barron Wright & White, on the brief) *for appellant.*

PER CURIAM:

This is an appeal from a decree in a consolidated cause in the admiralty awarding damages and costs to the owner of the Motor Vessel Angela Fassio against the Tank Steamer E. W. Sinclair as solely responsible for a collision of the two vessels, and dismissing Sinclair's libel against the Fassio, in the District Court for the Southern District of New York, David N. Edelstein, District Judge. We find no error and affirm the judgment.

On December 3, 1959 the tanker E. W. Sinclair, a 520 foot vessel of 10,907 gross tons, fully loaded with 16,000 tons of fuel oil, was proceeding up the Delaware River about four miles astern of the motor vessel Angela Fassio, 492 feet long, of 7,016 gross tons. Encountering thick fog about 9:00 a. m. near Buoy 42, the Fassio turned to starboard, and anchored about 250 meters east of the channel. She sounded the bell signals called for in the Inland Rules, 33 U. S. C. § 19(d), applicable in this location. The Sinclair had been traveling at a sea speed of 13.3 knots which she reduced to about 10 knots before entering the fog in which visibility was no more than 100 meters. Assisted by a tidal current of 1½ knots she was proceeding in the fog at a speed over the ground of 11½ knots. Her radar was inoperable. Fassio's radar was working and picked up the Sinclair at a range of some three miles. Sinclair was ob-

served on the screen to be approaching along the easterly edge of the channel at about 12 knots speed. When she was about one mile away the Fassio sounded the international "R" signal on her whistle (one short, one long, one short). At .5 mile she repeated the signal. On passing Buoy 42 and hearing the three whistle signal, the Sinclair made a 20° right turn out of the channel and collided with the Fassio, tearing her plates and frames from the forward end of her No. 1 hold to the after part of her No. 3 hold, approximately 180 feet.

The Sinclair was plainly guilty of faulty navigation in proceeding into heavy fog, with visibility of barely more than half her length, with her radar out of order, in and near a heavily traveled channel, at so high a speed. She contends, however, that the Fassio gave a three short blast signal, signifying a vessel backing, and so confused the Sinclair as to cause the collision. The factual issue as to the nature of the signal given was resolved against the Sinclair's contention on conflicting testimony and the determination is not clearly erroneous. We find no error here. *McAllister* v. *United States*, 348 U. S. 19 (1954).

Appellant contends, however, that even if the signal given was the international "R", the Fassio was at fault in giving it, since it is not found in the Inland Rules, and was likely to confuse another vessel. This contention appears to us not well founded. Article 29 of the Inland Rules, 33 U. S. C. § 221, provides in part "Nothing in these rules shall exonerate any vessel * * * from the consequences of * * * the neglect of any precaution which may be required by the ordinary practice of seamen, or by the special circumstances of the case." Under the circumstances here we cannot agree that the sounding of the signal by the master of the Fassio was a fault. A ship was bearing down on him in thick fog at high speed. His required bell signal,

which he was sounding, was of limited range. He could not know whether the approaching vessel was using radar. Some supplemental notice of his own presence was a natural response to the situation with which he was faced. The danger signal would have indicated that he was himself under way. The "R", although not called for in the Inland Rules, had an appropriate meaning (vessel anchored in the fog) known to all mariners familiar with the International Rules. We hold that its omission from the Inland Rules does not prohibit its use to supplement the fog bell and find no fault in its use by the Fassio here. The decree of the District Court is affirmed.

(Amendment of Opinion)

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

VILLAIN & FASSIO E COMPAGNIA, INTERNATIONAL DI GENOVA SOCIETA, RIUNITE DINAVIGAZIONE, S.p.A., as owner of the Motor Vessel ANGELA FASSIO,

Libellant-Appellee,

v.

Tank Steamer E. W. SINCLAIR, SINCLAIR REFINING COMPANY,

Claimant-Respondent-Appellant.

Before:

FRIENDLY, SMITH and MARSHALL,
Circuit Judges.

The petition for rehearing is denied. The wording of the opinion dated February 20, 1963 is amended so that the last paragraph of the opinion will read as follows:

> "Appellant contends, however, that even if the signal given was the international "R", the Fassio was at fault in giving it, since it is not found in the Inland Rules, and was likely to confuse another vessel. This contention appears to us not well founded. Article 29 of the Inland Rules, 33 U. S. C. § 221, provides in part 'Nothing in these rules shall exonerate any vessel * * * from the consequences of * * * the neglect of any precaution which may be required by the ordinary practice of seamen, or by the special circumstances of the case.' Under the circumstances here we cannot agree that the sounding of the signal by the master of the Fassio was a fault. A ship was bearing down on him in thick fog at high speed. His required bell signal, which he was sounding, was of limited range. He could not know whether the approaching vessel was using radar. Some supplemental notice of his own presence was a natural response to the situation with which he was faced. The danger signal might have indicated that he was himself under way, although its use in such circumstances could be sustained. *Victorias Milling Co.* v. *The SS Gulfport*, 166 F. Supp. 396 (S. D. N. Y. 1958), aff'd mem. 262 F. 2d 349 (2 Cir. 1958). In any case, the 'R', although not called for in the Inland Rules, had an appropriate meaning (vessel anchored in the fog) known to all mariners familiar with the International Rules. We hold that its omission from the Inland Rules does not prohibit its use to supplement the fog bell and find no fault in its use by the Fassio here. The decree of the District Court is affirmed."

HENRY J. FRIENDLY,
J. JOSEPH SMITH,
THURGOOD MARSHALL,
U. S. C. JJ.

March 18, 1963.

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OCTOBER TERM, 1963

No. 1015

SINCLAIR REFINING COMPANY,

Petitioner,

against

VILLAIN & FASSIO, INTERNAZIONALE DI GENOVA SOCIETA RIUNITE DI NAVIGAZIONE, S.p.A.,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI

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INDEX

	PAGE
Issues Decided Below	1
Statutes Involved	3
Facts in Brief	3
Reasons for Denying the Writ	5
Conclusion	11
Appendix	12

Citations

Belden v. *Chase*, 150 U. S. 674 (1893)	9
City of Alexandria, 31 F. 427 (S.D. N.Y., 1887)	8
The Gulfstar, 136 F. 2d 461 (3rd Cir., 1943)	6
The Merchant Prince (1892), Prob. Div. 179, cited with approval in *The Oregon*, 158 U. S. 186, 39 L. Ed. 943 (1894)	8
Oaksmith v. *Garner*, 205 F. 2d 262 (9 Cir. 1953)	9
Petition of Clyde-Mallory Lines, 1937 A.M.C. 837, not otherwise reported (S.D. N.Y. 1934)	8
Petition of Socony Vacuum Transp. Co., 93 F. Supp. 718 (S.D. N.Y. 1950)	6
Union Shipping & Trading Co. v. *U. S.*, 127 F. 2d 771 (2nd Cir. 1942)	8
United States v. *Woodbury*, 175 F. 2d 854 (1st Cir., 1949)	5
Victorias Milling Co. v. *ss Gulfport*, 166 F. Supp. 396 (S.D. N.Y., 1958), aff'd mem. 262 F. 2d 349 (2nd Cir., 1958)	8

Statutes

		PAGE
Inland Rules		
Article 15(d)	(33 U.S.C. § 191)	7
Article 16	(33 U.S.C. § 192)	2, 3
Article 18	(33 U.S.C. § 203)	3, 7
Article 27	(33 U.S.C. § 212)	5, 8
Article 29	(33 U.S.C. § 221)	5, 8

Miscellaneous

Farwell's "The Rules of the Nautical Road" (Prunski Ed.)	7

IN THE

Supreme Court of the United States

OCTOBER TERM, 1963

No. 1015

SINCLAIR REFINING COMPANY,

Petitioner,

against

VILLAIN & FASSIO, INTERNAZIONALE DI GENOVA SOCIETA RIUNITE DI NAVIGAZIONE, S.p.A.,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT.

BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI

The instant petition seeks only further review of an adverse decision reached essentially on factual grounds by the United States District Court for the Southern District of New York and affirmed unanimously by the Second Circuit. Neither of the decisions below involves any significantly new or unusual interpretation of federal admiralty law.

Issues Decided Below

The District Court (Edelstein, *J.*) held petitioner's fully loaded tanker solely at fault for this Delaware River collision with respondent's anchored M V ANGELA FASSIO primarily because the tanker was admittedly pro-

ceeding at excessive speed in thick fog (162a-163a) and because respondent's lawfully anchored vessel enjoyed a high presumption of innocence which was not rebutted (161a).

The District Court held also that, even if petitioner's vessel had, as it contended, turned out of the channel on hearing a "three whistle" signal from out of the fog ahead, it committed thereby an additional statutory fault in making such blind maneuver in dense fog without reducing speed because it had failed, as required by Inland Rule 16 (33 U.S.C. 192), to "* * * stop her engines, and then navigate with caution until danger of collision is over". In so holding, the District Judge stated (176a):

> "What was in the minds of the captain and pilot of the Sinclair which motivated them to maneuver as they did will forever remain in the realm of conjecture. But what is clear is that Sinclair was careless and reckless and is solely at fault for the collision with the Angela Fassio."

Neither the District Court nor the Circuit Court (Friendly, Smith, and Marshall, *JJ.*) held, as petitioner asserts, that the Inland Rules should be read as incorporating the provisions of the International Rules which permit use of the "R" signal (short, long, short blasts) to denote a vessel at anchor in fog. Both courts decided *only* that the special circumstances of the particular case warranted the use of a supplementary signal and that use of the internationally known "R" signal was not inherently confusing and therefore *not unlawful*.

The District Court held also, without comment by the Circuit Court, that (173a):

> Even giving the Sinclair the best of all the arguments concerning the propriety of the supplement-

ary signal would not require the Fassio to share the damages. Sounding this supplementary signal here would be, at best, a passive or minor fault, and would come within the major-minor fault principle (citing cases). The gross faults of the Sinclair so flagrantly and heavily outweigh any passive fault on the part of the Fassio that in this case it is particularly apt to say that 'the interests of justice are best served by condemning the culpable vessel completely'. *Compania de Maderas de Caribien* v. *The Queenston Heights*, 220 F. (2d) 120, 1923 (5th Cir.), cert. den. 350 U. S. 824 (1955)."

Statutes Involved

In addition to the statutory provisions referred to in the petition, there are also involved Articles 16 and 18, Rule IX, of the Inland Rules (30 Stat. 99, 100; 33 U.S.C. 192, 203) which are printed in the appendix (infra, p. 12).

Facts in Brief

While properly anchored in dense fog of 100 yards visibility approximately one ship length off the easterly edge of the Delaware River channel, respondent's M/V ANGELA FASSIO was struck heavily by petitioner's fully loaded tanker, SS E. W. SINCLAIR. The anchor fluke of the tanker tore through the starboard plates and frames of the anchored vessel for a distance of some 180 feet before the tanker came to rest in response to her engines which were turning emergency full astern.

The SINCLAIR, inbound to the Philadelphia area, had been proceeding up-channel about four miles astern of respondent's vessel. The tanker's radar was inoperative. On encountering thick fog in the area of buoy "42" marking the easterly edge of the channel, ANGELA FASSIO had

turned out of the channel to the east and anchored. The SINCLAIR entered fog a short time later proceeding at ten knots with a flood current of 1½ knots. Those in charge of the SINCLAIR claim to have heard, on entering and shortly after entering the fog, two sets of whistle signals from ahead indicative of an unseen vessel backing down (three short blasts). Whether for this or some other reason (possibly to anchor as suggested by respondent's proof at the trial), the SINCLAIR turned out of the channel on passing buoy "42" bearing down on the unseen ANGELA FASSIO at an effective speed in excess of 11 knots.

Meanwhile, the anchored ANGELA FASSIO, equipped with a functioning radar, had detected electronically the approaching SINCLAIR at a distance of some three miles. Radar observation indicated a vessel approaching at unbated high speed. Limitations of radar target discrimination required her master to assume that the target was proceeding along either the extreme easterly edge of the channel or even more directly toward his unmaneuverable ship. The easterly set of the current could be expected to set the approaching ship down on the ANGELA FASSIO. Having himself encountered fog in the same area only a half hour earlier, he knew that visibility was barely more than half the length of the approaching ship. Nor could he overlook the possibility that the approaching ship might intend to anchor as he had done earlier. The ANGELA FASSIO's fog bell, although being in all respects properly sounded, could not be heard in time to avoid collision (155a).

The ANGELA FASSIO twice sounded the international "R" signal (short, long, short blasts), once when the ships were 1.0 miles apart and once when only a half mile separated the ships. Shortly afterwards the SINCLAIR was

observed to emerge from the fog close at hand and at high speed. The collision ensued.

Reasons for Denying the Writ

The writ should be denied because the petition fails to show any legal issue requiring the attention of the Court. The question decided below was simply whether, under well-established navigational rules, the use of a supplementary signal in addition to the required bell signal was warranted. The decisions below were clearly controlled by the particular facts of the case and may not reasonably be read as having any broader import.

Article 27 of the Inland Rules (33 U. S. C. 212) requires that "* * * due regard shall be had to all dangers of * * * collision * * *" and authorizes a "departure" from such rules when "* * * necessary in order to avoid immediate danger". Article 29 (33 U. S. C. 221), commonly referred to as the General Prudential Rule, expressly provides that:

> "Nothing in these rules shall exonerate any vessel * * * from the consequences of * * * the neglect of any precaution which may be required by the ordinary practices of seamen, or by the special circumstances of the case."

Thus, the Inland Rules authorize "departure" from the prescribed system of signals in special circumstances where necessary to avoid danger of collision and condemn robot-like adherence to such prescribed system when it should be apparent that the signal specified is not equal to the requirements of the occasion.

United States v. *Woodbury*, 175 F. 2d 854 (1st Cir., 1949), referred to with approval by the petition (p. 4), held a vessel in inland waters at fault for ***not*** utilizing a warning signal prescribed by the International Rules.

There, as here, the Court was required to decide what action, if any, was required by the particular circumstances presented. In that case, a trawler was fishing during daylight hours with her nets down in an area in which the master knew a submarine was maneuvering. Although the Inland Rules did not specifically require that such a trawler exhibit any signal during daylight hours to warn that her nets were down, the Court nevertheless held the trawler at fault for failing to give the submarine an effective warning of danger by displaying the appropriate international signal.

Captain Zustovich of the ANGELA FASSIO had approximately three minutes in which to appraise the probable danger of collision and to decide what, if any, further precaution he should take to avoid it. More than three years of erudite hindsight has failed to demonstrate either that his decision was wrong or that it could have been improved upon. See *The Gulfstar,* 136 F. 2d 461, 465 (3rd Cir., 1943) with respect to "after the event" criticisms of "those who navigate from the witness chair." Captain Zustovich, although sounding the prescribed fog bell, knew that it was not designed to and could not be heard in time aboard a vessel traveling at a speed of 10 knots in fog. *Petition of Socony Vacuum Transp. Co.,* 93 F. Supp. 718 at 734, 736 (S.D. N.Y. 1950).

In the District Court, petitioner contended that if any signal was required, the "danger" signal (four short blasts) should have been used and, alternatively, that ANGELA FASSIO had actually sounded a backing signal (three short blasts) which confused those in charge of the SINCLAIR. On appeal to the Circuit Court, petitioner changed tactics, arguing that the fears of Captain Zustovich were groundless and that he should not have sounded any signal at all but merely awaited develop-

ments. Both courts concluded on the basis of the facts presented that the use by the ANGELA FASSIO of a whistle signal to supplement the prescribed but ineffective fog bell was a matter of prudent seamanship which was permitted by the Inland Rules (71a-172a); that ANGELA FASSIO had, in fact, sounded the "R" signal (169a); that such signal was known to both the captain and pilot of the SINCLAIR as well as to mariners generally (171a) and that, since it was not misleading, use of the "R" signal by the FASSIO was not improper (171a).

The "danger" signal advocated by petitioner as the only permissible "departure" from the Inland Rules is itself expressly forbidden by such rules except in the case of vessels both of which are maneuvering in sight of each other. Art. 18, Rule IX (33 U.S.C. 203). Whether it may also have been properly used by an anchored vessel, in fog is quite beside the point. The Inland Rules make specific provision only for the use of a fog bell by a vessel at anchor in fog (Art. 15(d), 33 U.S.C. 191). Accordingly, whatever *whistle* signal was used would, in the same sense, be a "departure" from the Rules.

Stripped to its essentials, the basis of SINCLAIR's petition is that, although this Court has not outlawed the potentially confusing use of the "danger" signal by vessels in fog as a supplementary warning, nevertheless, it should do so with respect to the "R" signal. In support of such contention, it cites only Farwell's *"The Rules of the Nautical Road"*, as edited by Lt. Commander Alfred Prunski. While well known as a navigational handbook, such work neither is nor pretends to be an analytical legal treatise. The single sentence upon the literal meaning of which SINCLAIR places such cardinal reliance, is found in the chapter entitled "Rules in Fog". As is true

of the entire edition (see foreword, p. xii), the material contained in such chapter, is concerned primarily with detailing the differences between the signals specifically prescribed by the Inland Rules and by the International Rules. In the same chapter, the author recognizes that, in special circumstances, the courts have approved the use of supplementary signals in fog in addition to those specifically prescribed by the Inland Rules.

The cases upholding the use of a "danger" signal in special circumstances do not consider the use of a supplementary signal to be an *unauthorized* departure from the Inland Rules. Articles 27 and 29 authorize and, at times, mandate unusual action for unusual conditions.

Petition of Clyde-Mallory Lines, 1937 A.M.C. 837, not otherwise reported (S.D. N.Y. 1934);
Victorias Milling Co. v. *SS Gulfport*, 166 F. Supp. 396 (S.D. N.Y., 1958), aff'd mem. 262 F. (2d) 349 (C.C.A. 2, 1958);
City of Alexandria, 31 F. 427 (S.D. N.Y., 1887);
The Merchant Prince (1892), Prob. Div. 179, cited with approval in *The Oregon*, 158 U. S. 186, 39 L. Ed. 943 (1894).

As noted by the petition (p. 8), the "R" signal was introduced by congressional amendment to the International Rules effective January 1, 1954. The cases referred to above and *Union Shipping & Trading Co.* v. *U. S.*, 127 F. 2d 771 (C.C.A. 2, 1942) cited in the petition (pp. 7, 9) were concerned exclusively, as were the Courts below in the instant case, with the essentially factual issue of whether truly unusual or special circumstances were proven. Although such cases passed upon the circumstances under which a supplementary signal might or might not be used, they did not consider the use of the "R" signal as a

supplementary warning. This is only because all such cases antedated the more recent recognition and promulgation of the signal. None of such cases, however, turned upon the particular signal used but rather upon whether any supplementary signal was warranted or required by the facts as found by the court.

The remaining cases cited by petitioner, viz. *Oaksmith* v. *Garner*, 205 F. 2d 262, 266 (9 Cir., 1953); *Belden* v. *Chase*, 150 U. S. 674 (1893), are concerned with situations in which the procedures and signals specifically prescribed by the Inland Rules were either not observed or deliberately avoided. In the case at bar, the required fog bell was found to have been properly sounded by the ANGELA FASSIO (154a). Accordingly such decisions are inapposite to the case at bar.

The petition is also premised upon the unwarranted factual assertions that (a) there was no occasion for the use of any supplementary signal, and (b) the "R" signal, indicating a ship at anchor in fog, was comparatively unknown and therefore not an appropriate choice of a supplementary signal. Both such factual contentions were thoroughly considered and rejected by the District Court. Both were again considered and rejected by the Circuit Court on appeal. Such discredited contentions are nevertheless postulated as fact for purposes of the petition.

Thus, the petition asserts that the ANGELA FASSIO should simply have ignored the rapidly approaching radar target (p. 7), even though but a half mile distant (p. 5). The SINCLAIR, it is claimed, would have passed unseen if the fog on the easterly edge of the channel at a distance of 250 meters or one ship's length. The master of the FASSIO was, however, entitled and required to act on the

basis of observed information *then* available to him. He was not, as asserted, privileged to ignore such clear warning of imminent danger upon the chance that hindsight might disclose a different situation. In fact, by their own version of the matter, those in charge of the SINCLAIR made just such a guess and guessed wrongly with near calamitous results (167a).

The "R" signal was known to mariners the world over, whether deep sea or shoal, as denoting a ship at anchor in fog. Both the master (75-76b) and pilot (62a) of the SINCLAIR testified they were familiar with the signal and its meaning. The FASSIO's pilot failed to recognize the signal because he was below in a closed cabin and partially asleep at the time (82a)—a circumstance not disclosed by the petition in attributing to such pilot (p. 7) the statement that the signal was "something unfamiliar".

Petitioner plainly misreads the decision of both the District Court and the Circuit Court in asserting that such decisions have judicially amended the Inland Rules and brought about a confusing commingling of the International and Inland Rules. The decisions below, like the decision of Captain Zustovich to blow a warning signal, rest entirely on the particular circumstances of the case and the array of considerations which compelled the master to warn of the presence and position of his vessel in dense fog. Neither decision can fairly be read as permitting a "choice" between adherence to the signals prescribed by the International Rules and those prescribed by the Inland Rules. Petitioner's dire warnings of impending chaos are clearly contrived for the purpose of the petition.

CONCLUSION

The petition for a *writ of certiorari* should be denied.

ALBERT D. JORDAN,
ROBERT J. NICOL,
Counsel for Respondent.

May 1, 1963

APPENDIX A

The additional pertinent provisions of the Inland Rules (33 U.S.C. 151-232) are:

§ 192. *Speed in fog, etc.* (Art. 16)

"Every vessel shall, in a fog, mist, falling snow, or heavy rainstorms, go at a moderate speed, having careful regard to the existing circumstances and conditions.

"A steam vessel hearing, apparently forward of her beam, the fog signal of a vessel the position of which is not ascertained shall, so far as the circumstances of the case admit, stop her engines, and then navigate with caution until danger of collision is over. June 7, 1897, c. 4, § 1, 30 Stat. 99."

§ 203. *Steam vessels approaching, meeting, or passing one another; banks obstructing view; leaving dock* (Art. 18)

* * * * *

"Rule III. If, when steam vessels are approaching each other, either vessel fails to understand the course or intention of the other, from any cause, the vessel so in doubt shall immediately *signify the* same by giving several short and rapid blasts, not less than four, of the steam whistle.

* * * * *

"Rule IX. The whistle signals provided in the rules under this article, for steam vessels meeting, passing, or overtaking, are never to be used except when steamers are in sight of each other, and the course and position of each can be determined in the daytime by a sight of the vessel itself, or by night by seeing its signal lights.

"In fog, mist, falling snow or heavy rainstorms, when vessels cannot so see each other, fog signals only must be given. June 7, 1897, c. 4, § 1, 30 Stat. 100; Aug. 21, 1935, c. 595, § 2, 49 Stat. 669."

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VILLAIN & FASSIO, INTERNAZIONALE DI GENOVA SOCIETA RIUNITE DI NAVIGAZIONE, S.p.A.,

Respondent.

PETITIONER'S REPLY BRIEF

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Respondent.

PETITIONER'S REPLY BRIEF

Respondent's counsel err in saying:

> "Neither decision can fairly be read as permitting a 'choice' between adherence to the signals prescribed by the International Rules and those prescribed by the Inland Rules." (Respondent's brief, p. 10).

To the contrary, the District Court said:

> "The question of whether the FASSIO was at fault in sounding the R signal can be broken down into two parts: (1) Was the master justified in sounding any supplementary signal and (2) was his choice of the R signal improper?" (169a).
>
> • • •
>
> "Knight recognizes the availability of a danger signal as a supplementary signal • • •" (172a).

And that theory of "choice" of signals was adopted by the Court of Appeals when it amended its opinion after petition for rehearing. The opinion now reads:

> "The danger signal might have indicated that he was himself under way, although its use in such circumstances could be sustained" (Appendix to peti-

tion, p. 19; Court of Appeals opinion since reported at 313 F. 2d 722).

Despite their disavowal, respondent's counsel repeatedly and mistakenly advocate substituting "choice" for uniformity in the Inland Rules: (1) They argue that use of any signal "not inherently confusing" would not be unlawful (Respondent's brief, p. 2); (2) They attack the fictitious premise that the "R" signal "was comparatively unknown and therefore not an appropriate choice of a supplementary signal" (Respondent's brief, p. 9); (3) They even say that whether the danger signal "may also have been properly used by an anchored vessel in fog is quite beside the point" (Respondent's brief, p. 7). The phrase last quoted follows the wholly mistaken assertion that:

> "The 'danger' signal advocated by petitioner as the only permissible 'departure' from the Inland Rules is itself expressly forbidden by such rules except in the case of vessels both of which are maneuvering in sight of each other. Art. 18, Rule IX (33 U. S. C. 203)". [Respondent's brief, p. 7].

Far from being a departure from or forbidden by the Inland Rules, the danger signal is mandatory thereunder for a vessel at anchor in fog when threatened by maneuvers of something beyond the range of her fog bell (Petition, p. 10). The danger signal is a fog signal as well as a clear weather signal and is not a signal for "meeting, passing or overtaking", those being the signals forbidden "except when steamers are in sight of each other" (33 U. S. C. 203; Respondent's Appendix A, p. 12).

The disrupting effect of substituting "choice" for uniformity, thus shows through opposing counsel's attempt to clutter the issue.

Respectfully submitted,

EUGENE UNDERWOOD,
Counsel for Petitioner.

May 3, 1963.